# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 748

JOHN ALBERT BAKEWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–18) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 7, 1970. A petition for rehearing and petition for rehearing *en banc* were denied on August 27, 1970. The petition for a writ of certiorari was filed on September 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



407-424—70

## QUESTION PRESENTED

Whether petitioner could properly be sentenced to six months' imprisonment without seeing the contents of a presentence investigation report where no request for disclosure of the report was made before sentencing.

## STATEMENT

Petitioner, charged with four counts of unlawful sale and possession of amphetamines within the meaning of 21 U.S.C. (Supp. V) 321(v), pleaded guilty to one count of selling amphetamines in violation of 21 U.S.C. (Supp. V) 331(q)(2) in the United States District Court for the Middle District of Florida. The other counts were subsequently dismissed and sentence was deferred until completion of a presentence investigation report. After consideration of the report, which contained no record of any previous conviction or offenses (S. Tr. 3–4),[1] the court sentenced petitioner to six months' imprisonment.[2]

On the day he was to commence serving his sentence, petitioner filed a motion for reduction of sentence (Pet. App. 19). At the hearing, petitioner requested that he be allowed to inspect the presentence investigation report to ascertain whether it contained possibly misleading information regarding his financial background (M. Tr. 7–8). This request was denied as was the motion for reduction of sentence (Pet. App.

[1] "S. Tr." and "M. Tr." refer respectively to the transcripts of the sentencing hearing and of the modification of sentence hearing and have been filed by the government with this Court.

[2] Under 21 U.S.C. (Supp. V) 333(b)(1), petitioner could have been imprisoned for up to 5 years or fined up to $10,000 or both.

19–20; M. Tr. 20–21). Petitioner's subsequent motion to include the presentence investigation report in the record on appeal was granted (Pet. App. 20), and he now claims that the report contains "false and misleading derogatory information (Pet. 5). The court of appeals affirmed (one judge dissenting), holding that disclosure of the contents of a presentence report is a matter within the discretion of the trial court (Pet. App. 12–18). A petition for rehearing and petition for rehearing *en banc* were denied, with two judges dissenting from the denial of rehearing *en banc* (Pet. App. 18–19).

## ARGUMENT

Petitioner's claim that he had an absolute right to see the presentence investigation report was properly rejected by the court below. Under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, which provides that a sentencing court "may disclose to the defendant" material contained in a presentence report, disclosure is discretionary. *Gregg* v. *United States*, 394 U.S. 489, 492.

The issue of whether presentence reports should be shown to defendants as a matter of right has been given considerable attention by the Advisory Committee on the Federal Rules. In amending Rule 32 in 1966, the Committee weighed arguments favoring and opposing disclosure and recommended the discretionary Rule which this Court promulgated. See Notes of Advisory Committee on Rules 18 U.S.C. (Supp. V) App., p. 1203. Recently, the Committee has recommended that the rule be amended to provide that the

report be shown to the defendant "unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons." See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Rule 32.2. Since the Committee is presently considering this amendment, we do not believe it would be appropriate for the Court, at this time, to reexamine its decisions indicating that it is not a denial of due process of law for a sentencing court to rely on a presentence investigation report without disclosing the report to the defendant or giving him an opportunity to rebut it. *Williams* v. *New York,* 337 U.S. 241; *Williams* v. *Oklahoma,* 358 U.S. 576. See, also, *Specht* v. *Patterson,* 386 U.S. 605, 606–608; *North Carolina* v. *Pearce,* 395 U.S. 711, 726.

At all events, petitioner in this case made no request to see the contents of the presentence investigation report before sentencing; he first raised the issue at the hearing on a motion to modify the sentence. Although the trial judge denied this request, he subsequently disclosed the entire report to the defense and ordered the report to be made part of the record on appeal. In this order the court observed: "Judges, of course, are presumed to be trained to disregard immaterial prejudicial matter, if any should appear, and to require further investigation to personally determine at sentencing or otherwise the facts concerning any prejudicial matter deemed material which should appear in the report" (Appellant's Appendix to brief in court of appeals A11–A12). Nor does the record

suggest, as petitioner argues, that the court based the sentence on any specific unfavorable matter in the report.[3] Rather, the record indicates that the court imposed this sentence because it was convinced that "traffic in amphetamine tablets is one that is dangerous, and particularly when it is used among long distance trucking operators it not only harms them but it is a menace to society in general" (S. Tr. 9; M. Tr. 19).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1970.

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[3] In the court below, petitioner argued (Brief for Appellant, pp. 5–6) that he could rebut a statement in the report which he said exaggerated the number of pills that he sold. At no point in the record, however, is there any indication that the court considered anything other than the 20,015 pills that petitioner had admitted selling when he pleaded guilty.

U.S. GOVERNMENT PRINTING OFFICE: 1970